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In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWIN PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner argues that the district court imposed an invalid condition of probation and that its revocation of his probation violated his Fifth Amendment privilege against compulsory self-incrimination.

Petitioner pleaded guilty in the United States District Court for the Central District of California to thirteen counts of concealing assets with intent to evade or defeat the assessment or collection of federal wagering excise taxes, in violation of 26 U.S.C. 7206 (4). The trial court sentenced him to concurrent terms of three years' imprisonment on each count and imposed a $5,000 fine on each count. The court sus-

pended the prison sentence and placed petitioner on five years' probation on the condition, *inter alia,* that he testify under oath before a representative of the United States Attorney "on all questions as to his financial condition relating to amounts and locations of all assets" (Pet. App. 738; see also I-Tr. 55).[1] In response to a direct question from the court, petitioner agreed to the terms of the judgment (Pet. App. 738; I-Tr. 57; see also I-Tr. 53–54). The trial court also advised petitioner that it would consider a motion to reduce the fine after petitioner provided the information concerning his assets (I-Tr. 53–54).

At the time appointed to carry out the condition of probation, petitioner reversed himself and refused to testify before the United States Attorney as to his financial condition. Petitioner objected to the proposed deposition on Fifth Amendment grounds and refused to answer any questions (Pet. App. 738; Deposition of Edwin Pierce, pp. 7, 9, 10). At the subsequent probation revocation hearing, petitioner admitted that he had failed to comply with the condition of probation. Petitioner stated that he feared that disclosure of his assets could expose him to prosecution for income tax violations or subject his assets to seizure (Pet. App. 738; II-Tr. 5; see also I-Tr. 61, 65).

[1] "I-Tr." and "II-Tr.," respectively, refer to the transcripts of the plea and sentencing proceedings and the probation revocation proceedings.

Because petitioner has reproduced the opinion of the court of appeals as it appears in the Federal Reporter, we have employed that pagination in our references to the opinion.

The trial court rejected petitioner's claim that the condition of probation infringed upon his Fifth Amendment privilege (Pet. App. 738) and revoked his probation. The court of appeals affirmed, with one judge dissenting (Pet. App. 737–744). In the court's view, the conditions imposed by the trial court carried out the purposes of the Federal Probation Act (Pet. App. 739), and petitioner's blanket refusal to answer any questions at the deposition made it impossible to evaluate his Fifth Amendment claim (Pet. App. 742).

1. Pursuant to 18 U.S.C. 3651, a district court upon entering a judgment of conviction in a case involving an offense not punishable by death or life imprisonment "may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best." The purpose of the statute is to permit rehabilitation without incarceration. *United States* v. *Murray,* 275 U.S. 347, 357; *Roberts* v. *United States,* 320 U.S. 264, 272. In construing this provision of the Probation Act, the courts of appeals have held that the only limitation upon the sentencing judge's power to impose conditions upon probation is that "the conditions have a reasonable relationship to the treatment of the accused and the protection of the public." *Porth* v. *Templar,* 453 F. 2d 330, 333 (C.A. 10). See also *United States* v. *Consuelo-Gonzalez,* 521 F. 2d 259, 264 (C.A. 9) (*en banc*).

Here, as the court of appeals concluded, the trial court's condition in imposing probation plainly bore

a reasonable relationship to petitioner's rehabilitation and the protection of the public. Since petitioner had pleaded guilty to unlawfully concealing assets, the trial court's condition that he testify as to the location and amount of his assets would make it more difficult for petitioner to commit similar crimes in the future. Thus, the condition of probation was directly related to petitioner's crime and well within the trial court's broad discretion. See, *e.g.*, *Whaley* v. *United States*, 324 F. 2d 356, 359 (C.A. 9) certiorari denied 376 U.S. 911; *Barnhill* v. *United States*, 279 F. 2d 105, 106–107 (C.A. 5), certiorari denied, 364 U.S. 824; *United States* v. *Kohlberg*, 472 F. 2d 1189, 1190 (C.A. 9).[2]

Contrary to petitioner's argument (Pet. 34–35), the trial court was not required to consider the possibility of a Fifth Amendment claim when it imposed

[2] Petitioner argues (Pet. 33) that the district court's condition of probation was not related to his rehabilitation but was imposed solely to fix the amount of the fine. In support of this contention, petitioner cites the trial court's statement to him (I–Tr. 53) that "[a] fine is warranted, a fine to be determined, however, by whatever your assets disclose."

But the court of appeals correctly pointed out (Pet. App. 739 n. 2) that the trial court's oral statements must be appraised in the context of his entire remarks. In this respect, the trial court also stated (*ibid.*): "I think the government is entitled to an examination under oath as to your assets. Beyond that, I cannot see any need for probation supervision except approval of your residence and approval of your occupation."

At all events, in appraising the validity of the condition of probation, the court of appeals properly placed its reliance upon the written text of the condition that petitioner "testify under oath before a representative of the United States Attorney's Office * * * on all questions as to his financial condition relating to amounts and locations of all assets" (Pet. App. 738).

the condition of probation. At the time of sentencing, petitioner accepted the condition and raised no Fifth Amendment claim.[3] As the court of appeals recognized (Pet. App. 741), "the district judge could properly assume that the condition on its face did not require self-incrimination and the condition was valid as imposed." The trial court was not required to anticipate the later claim of the privilege by petitioner, much less decide the validity of such a claim in advance. See *Garner* v. *United States*, 424 U.S. 648, 655.

2. Petitioner further argues (Pet. 41–50) that the district court's revocation of his probation violated his Fifth Amendment privilege against compulsory self-incrimination. But the court of appeals' conclusion that petitioner's "blanket refusal to answer any questions * * * [made it] unable to evaluate his Fifth Amendment claim" (Pet. App. 741–742) is in accord with the decisions of this Court.

Assuming *arguendo* that petitioner would have been privileged to refuse to answer some of the questions that the United States Attorney would have asked him with respect to his assets, petitioner could not "draw a conjurer's circle around the whole matter" (*United States* v. *Sullivan*, 274 U.S. 259, 264) by claiming the privilege in advance of any question having been put to him. As the Court observed in *Hoff-*

[3] Indeed, at the time of sentencing, petitioner seemed eager to reveal his financial assets immediately; his counsel advised the court that petitioner could "tell the Court in just a few minutes under oath what his financial situation is" (I–Tr. 53–54; see also Pet. App. 738).

man v. *United States*, 341 U.S. 479, 486, "[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States*, 340 U.S. 367 (1951), and to require him to answer if 'it clearly appears to the court that he is mistaken.' *Temple* v. *Commonwealth*, 75 Va. 892, 899 (1881)." Thus, the privilege must be claimed with respect to each question so that each question can be considered "in the setting in which it is asked."[4] *Hoffman* v. *United States*, *supra*, 341 U.S. at 486. See also *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, 480; *Garner* v. *United States*, 424 U.S. 648, 658 n. 11; *O'Connell* v. *United States*, 40 F. 2d 201, 205 (C.A. 2).

Here at the outset of the hearing held to ascertain information about his assets, petitioner advised the United States Attorney that he would not answer any questions (see Pet. App. 738). Since this blanket refusal is not a proper invocation of the privilege, the court of appeals correctly concluded that "we need proceed no further in determining the extent of

[4] The courts of appeals have rejected blanket claims of the privilege in the context of tax investigations. See, *e.g.*, *In re Turner*, 309 F. 2d 69, 71 (C.A. 2), *United States* v. *Malnik*, 489 F. 2d 682, 685 (C.A. 5), certiorari denied, 419 U.S. 826; *United States* v. *Roundtree*, 420 F. 2d 845, 852 (C.A. 5); *United States* v. *Auwerkamp*, 497 F. 2d 832, 836 (C.A. 7); *United States* v. *Jones*, 538 F. 2d 225, 226 (C.A. 8), certiorari denied, 429 U.S. 1040; *Daly* v. *United States*, 393 F. 2d 873, 878 (C.A. 8); *United States* v. *Bell*, 448 F. 2d 40, 42 (C.A. 9); *United States* v. *Theep*, 502 F. 2d 797, 798 (C.A. 9).

[petitioner's] Fifth Amendment rights in the circumstances of this case" (Pet. App. 742).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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